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No. 09-1499

In the Supreme Court of the United States

FEESERS, INC.,

Petitioner,

v.

MICHAEL FOODS, INC. AND SODEXHO, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

International Foodservice Distributors Association ("IFDA") is a not-for-profit trade association comprised of over 165 foodservice distributors that operate more than 700 distribution facilities with sales of over $110 billion annually. The foodservice distribution industry sells and distributes food and related products to restaurants, institutions, and other food-away-from-home foodservice operations. IFDA's distributor members range from smaller, privately owned local and regional firms to larger, publicly traded firms that operate nationwide.

Foodservice distributors compete with each other as well with food management companies that provide an integrated package of food procurement, distribution and management services to their customers. They also compete with group purchasing organizations ("GPOs"), which are groups of foodservice purchasers that band together to use their combined purchasing power to secure favorable prices from food manufacturers. In many cases, the favorable prices available to management companies and GPOs are not available to foodservice distributors – such as IFDA's members – whether they are large or small. In IFDA's view, these discriminatory pricing

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[1] The parties have consented to the filing of this brief. Counsel for all parties have been given notice of the *amicus curiae's* intention to file their brief as required by Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

practices are the precise type of evil that the Robinson-Patman Act was intended to prevent. IFDA and its members seek a "level playing field" where all foodservice distributors, management companies, and GPOs can compete fairly and equitably in the marketplace.

Many foodservice sales – particularly where management companies and GPOs are involved – take place through a two-tiered competitive "bid" and contract process. The anti-price discrimination provisions of the Robinson-Patman Act should apply without regard to whether the discriminatory discounts were only offered by manufacturers to distributors during distributors' initial bidding and competition for the business of end purchasers. The Third Circuit incorrectly reached a different conclusion, effectively exempting the foodservice distribution industry – and all other industries where intermediate distributors may be selected through a bid-type process for selling products and services to end users – from the reach of the Robinson-Patman Act.

IFDA respectfully suggests that this Court should review the Third Circuit's decision. As the representative of distributors comprising a significant block of the foodservice distribution industry, both large and small, IFDA is uniquely poised to speak to the issues that this case raises and advocate for continuing application and enforcement of the antitrust laws in the manner in which they were designed.

SUMMARY OF THE ARGUMENT

This case presents the crucial question of whether the Robinson-Patman Act has any continuing applicability in the foodservice distribution industry or, in fact, in any industry in which sales frequently arise from a two-tiered competitive bid and contract process. Nothing in the plain language or legislative history of the Robinson-Patman Act excludes such transactions and sales processes from the Act's reach. Nevertheless, the net effect of the Third Circuit's holding is to put sales to competing distribution and service management organizations, which compete with each other on a bid-type basis, outside the scope of the Act. *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191 (3d Cir. 2010) ("*Feesers II*").

In an earlier appeal of this case, the Third Circuit concluded that Feesers only needed to show that it and Sodexho were in direct competition for the same foodservice dollars from the same foodservice customers to make its case. *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 214-15 (3d Cir. 2007) ("*Feesers I*"). In the current appeal, however, the *Feesers II* court has required more. Relying on a misreading of the holding in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) ("*Volvo Trucks*"), the *Feesers II* court has created a new "two competing sales to the end user" requirement for establishing a Robinson-Patman Act violation. Nothing in the *Volvo Trucks* decision supports this tack. Moreover, if the analysis is not shifted to where it properly belongs, to the sales by manufacturers to foodservice distributors, management companies, and GPOs, rather than to distributors' sales to end users -- the Third Circuit's decision will mean that the Robinson-Patman Act will

not be available to challenge discriminatory pricing by the manufacturer in sales to intermediate distributors, where the prevailing distributor, management company, or GPO has been selected by end users on account of its continuing access to highly favorable manufacturer discounts.

The *Feesers II* decision wreaks a devastating blow on the ability of smaller businesses – the very entities that the Robinson-Patman Act was enacted to protect – to compete against the Goliaths of the marketplace, such as GPOs and management companies in the foodservice distribution context. While the initial impact of an erosion of the Robinson-Patman Act may be lower prices, the ultimate effect will be the destruction of competition in the marketplace in the form of the demise of smaller businesses and the higher prices that will inevitably follow.

ARGUMENT SUPPORTING THE GRANT OF THE PETITION

I. The Robinson-Patman Act Broadly Prohibits Discrimination In Pricing And Applies With Equal Force To Sales To Intermediate Distributors Who Engage In Bidding As A Basis For Subsequent Product Sales.

The Robinson-Patman Act prohibits discrimination "in price between different purchasers of commodities of like grade and quality ...." 15 U.S.C. § 13.

Decades ago, in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), this Court explained that:

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages ....

Id. at 43. To combat the "evil" of large buyers competing unfairly against smaller ones based solely on size, the *Morton Salt* Court held that proof of competitive injury that is within the scope of the Robinson-Patman Act requires only a showing of substantial price discrimination among competing purchasers over time. *Id.* at 50-51. While this Court never has retreated from that seminal pronouncement, the *Feesers II* court did.

Contrary to this Court's holding in *Morton Salt*, the Third Circuit adopted a new "competing purchaser" requirement that vitiates the Robinson-Patman Act's application to even blatant price discrimination, unless two distributors make two competing sales *to the same end purchaser*, and not merely two competing purchases from the manufacturer. *Feesers II*, 591 F.3d at 207. Under this new requirement, the Third Circuit found no Robinson-Patman Act violation because Sodexho and Feesers did not each make sales to the same end users. This conclusion completely misses the fact that Michael Foods's highly disparate pricing to the two companies means that they will never be able to compete fairly when they bid for end users' business. Their bids to prospective institutional customers necessarily are skewed and distorted by the very different prices that Michael Foods makes

available to each of them before, during, and after the bid process.

The Third Circuit's decision effectively signals the death knell of the applicability of the Robinson-Patman Act to transactions in industries, such as foodservice distribution, where intermediate distributors use a bid-type process for becoming eligible suppliers of products and services to end users. It is difficult to conceive of a situation in which there will ever be two secondary line, competing sales. Once an end user selects a supplier, the Third Circuit decision in *Feesers II* would never look back to determine whether that selection was tainted by price discrimination in sales by manufacturers to intermediate distributors.

While IFDA comes to the Court representing competition in the foodservice distribution industry, in fact, the impact of the Third Circuit's decision is much broader. The principles espoused by the Third Circuit would apply to all industries that employ bid type processes of any type – outright bids, sealed bids, requests for proposals, and others – as the vehicle used to select suppliers and vendors.

In an apparent misunderstanding and misinterpretation of this Court's decision in *Volvo Trucks*, the Third Circuit ignored this Court's basic holding in *Morton Salt* that large buyers' quantity purchasing ability does not justify price discrimination. Only this Court can answer the question whether the *Volvo Trucks* decision actually supports the Third Circuit's new "competing purchaser" requirement that effectively excludes a manufacturer's sales terms to companies competing on

a bidding basis to supply goods and services to end purchasers from the scope of the Robinson-Patman Act. If this Court intended the *Volvo Trucks* decision to so broadly exclude distributors from the scope of the Act, it is the province of this Court – and not the Third Circuit – to so indicate. If, however, the *Volvo Trucks* decision is not intended to so severely limit the reach of the Robinson-Patman Act, then this Court should take the opportunity to preserve the Act's prohibition of unwarranted price discrimination. The Robinson-Patman Act was born to restrict the ability of mega-purchasers – such as GPOs and foodservice management companies – to demand and obtain unfairly anticompetitive discounts that smaller purchasers – such as typical foodservice distributors – cannot obtain.

Rather than continuing to apply the anti-price discrimination provisions of the Robinson-Patman Act, the *Feesers II* court concluded that *Volvo Trucks* "prevents the application of the [Robinson-Patman Act] to markets where the 'allegedly favored purchasers [bear] little resemblance to [the] large independent department stores or chain operations' that the [Robinson-Patman Act] was intended to target ...." *Feesers II*, 591 F.3d at 198 (quoting *Volvo Trucks*, 546 U.S. at 181 (alterations original)). The *Feesers II* court apparently did not understand that the parties here are closely analogous to those original models. In the 1930s, retail food chains and large department stores sprang up and offered more products and services than the pre-existing "mom-and-pop" competitors. Due to the high volume of sales they represented, these new retailers extracted significant, non-cost justified discounts that smaller competitors did not receive. While some may argue that these

discounts simply represent *vigorous* competition, the Robinson-Patman Act deems them to be *unfair* competition. Here, Sodexho, like the food retailer chains and large department stores of the 1930s, is using its purchasing power to garner discounts from Michael Foods and other suppliers that are not volume justified, thereby allowing it to compete unfairly against "mom-and-pops" like Feesers. This is precisely the type of unfair competition that the Robinson-Patman Act was enacted to prevent.

IFDA respectfully submits that this Court should grant Feesers's petition for a writ of certiorari, as this case provides an opportunity for the Court to reiterate the continued vitality of the Robinson-Patman Act to sales by manufacturers to distributors, where the distributors engage in bidding as a basis for their eligibility to make product sales to end users.

II. The Third Circuit Misused The *Volvo Trucks* Decision To Exempt Virtually All Sales To Distributors From The Scope Of The Robinson-Patman Act.

In *Volvo Trucks*, this Court narrowly held the Robinson-Patman Act inapplicable to "special order [items] ... sold though a customer-specific competitive bidding process." 546 U.S. at 170. That decision never suggested that all sales to distributors who engage in bidding as a basis for subsequent product sales are beyond the reach of the Robinson-Patman Act, yet that is precisely what the Third Circuit concluded.

As the *Volvo Trucks* Court recognized, the Robinson-Patman Act was Congress's response "to the advent of large ... enterprises with the clout to obtain

lower prices for goods than smaller buyers could demand." *Id.* at 175. Recognizing that smaller buyers could not effectively compete if they were not able to secure comparable pricing for goods of like grade and quality, Congress passed the Robinson-Patman Act "to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." *Id.* at 175 (quoting *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543 n.6 (1960)).

In order to prove a violation of the Act, a plaintiff must show sales of products of like grade and quality in interstate commerce at different prices to two customers with the effect of impairing competition. *Volvo Trucks*, 546 U.S. at 178. Where, as here, there is no issue as to the involvement of interstate commerce or goods of like grade and quality, a plaintiff may prove the remaining element of competitive injury simply by showing "a substantial price discrimination *between competing purchasers over time*." *Feesers I*, 498 F.3d at 213 (quoting *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (note omitted) (emphasis in original)). Alternatively put in terms of this case, "Feesers need prove only that (a) it competed with Sodex[o] to sell food and (b) there was price discrimination over time by [Michael Foods]." *Feesers II*, 591 F.3d at 197 (alterations original) (quoting *Feesers I*, 498 F.3d at 213).

Importantly, two crucial facts in this case were not in dispute. First, Feesers and Sodexho compete for the same foodservice customer dollars because they vie constantly to persuade customers or potential customers to switch from one to the other. *Feesers II*, 591 F.3d at 195. Second, on average over time,

Feesers paid 59% more for the same stock items – egg and potato products – than did Sodexho. *Id.* Seemingly, then, the present case presented a classic case of price discrimination. Remarkably, despite the fact that the Robinson-Patman Act prohibits price discrimination between competing sellers in sales of the same goods, the Third Circuit found that no Robinson-Patman Act violation existed.

That the Third Circuit could reach this conclusion in light of the above two undisputed facts is inexplicable. Equally inexplicable is the way that the Third Circuit drew upon this Court's *Volvo Trucks* decision to justify its conclusion, as the *Volvo Trucks* decision is both legally and factually inapposite.

The foundation of the Third Circuit's holding rested in the notion of "competing purchasers." According to that court, in order to be competing purchasers, two companies must be "directly after the same dollar." *Feesers II*, 591 F.3d at 197 (quoting *Feesers I*, 498 F.3d at 214). On remand after *Feesers I*, the district court found that Feesers and Sodexho in fact continually competed head-to-head for the same foodservice dollars. *Feesers, Inc. v. Michael Foods, Inc.*, 632 F. Supp. 2d 414, 427 (M.D. Pa. 2009). Despite the district court's finding, the Third Circuit added an unwarranted gloss to the competing purchaser analysis by concluding that the determination of whether two entities are competing purchasers is not limited to proving "substantial price discrimination between competing purchasers over time" (*Volvo Trucks*, 546 U.S. at 178-79 (quoting *Falls City*, 460 U.S. at 435)), but rather additionally "requires accounting for the timing of the alleged competition and the nature of the market." *Feesers II*, 591 F.3d at

199. It is here that the Third Circuit went astray. It erroneously read far more into *Volvo Trucks* than this Court wrote or likely intended.

In *Volvo Trucks*, buyers of custom-made heavy-duty trucks requested bids for products with their custom specifications from dealers representing different brands. At this initial stage of the process, there often was head-to-head, intrabrand competition among various Volvo dealers but no actionable price discrimination because Volvo's price was essentially uniform to all. It was only after the buyer selected the dealers that offered trucks that best matched its custom specifications – usually dealers for competing brands – that the chosen dealers sought additional price concessions from their manufacturers. At that point, there usually was only one dealer per brand. Thus, as a factual matter, at this stage of the sales process, plaintiff Volvo dealer Reeder-Simco GMC was able to point to only one lone sale for which it was in head-to-head competition with a fellow Volvo dealer and was discriminated against in the price. *Volvo Trucks*, 546 U.S. at 180.

Contrary to how the Third Circuit read *Volvo Trucks*, there was no blanket pronouncement that there can never be competing purchasers where a "bid"-type process is involved. Rather, the *Volvo Trucks* Court only concluded that that one sale did not constitute a substantial impairment of competition: "In short, if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between Reeder and the 'favored' Volvo dealer." *Id.*

In fact, read correctly, the *Volvo Trucks* decision actually supports the opposite conclusion than the one the Third Circuit reached. As this Court recognized in *Volvo Trucks*, "[a] dealer's reputation for securing favorable concessions ... may influence the customer's bidding invitations." 546 U.S. at 179 n.3. However, "Reeder did not present – or even look for – evidence that Volvo consistently disfavored Reeder while it consistently favored certain other dealers." *Id.* In the present case, Sodexho made a point of emphasizing during the bidding process its ability to obtain favorable prices from food suppliers such as Michael Foods.

The evidence in this case was uncontroverted that Michael Foods consistently granted 59% better pricing to Sodexho than to Feesers. This discriminatory pricing routinely gave Sodexho a better "reputation" (*Volvo Trucks*, 546 U.S. at 179 n.3), as well as an edge in bidding because it could secure its egg and potato products at far better prices than could Feesers. The clear evidence in the present case showed a pattern of highly disfavored pricing in every head-to-head contest, unlike the evidence in *Volvo Trucks* where Reeder-Simco GMC was able to advance only one isolated instance of disfavored pricing where it was in competition with another Volvo dealer.

Moreover, because the goods at issue in this case are stock items that Michael Foods sells to Sodexho and to Feesers on a day-to-day basis, rather than (as in *Volvo Trucks*) custom-made goods that are not manufactured until a sale has been made, there is even more reason why the Third Circuit should have recognized the sales as being within the scope of the Robinson-Patman Act.

The Third Circuit's rationale for imposing the requirement of two competing sales to the end purchaser to support a secondary-line Robinson-Patman Act violation stemmed from its mistaken focus on the wrong level of the purchasing equation. There never are two competing sales to the same end purchaser because once the end customer selects a distributor, Michael Foods will direct the products for that end purchaser only through the selected distributor. Discrimination should be measured by whether Michael Foods offers different prices to different distributors during the process of bidding and distributor selection.

The proper focus should be on whether Michael Foods made competing sales both to Sodexho and to Feesers. Clearly it did. Each of those entities buys the same food products on a continual basis and competes for the same customer dollars. As the constantly disfavored purchaser, Feesers cannot hope to compete effectively with Sodexho. Ironically, the Third Circuit's decision enables the precise evil that the *Morton Salt* Court condemned, namely, the securing of a competitive advantage based solely on size. Nothing in the *Volvo Trucks* decision supports or condones that result.

The Third Circuit's unwarranted expansion of the *Volvo Trucks* decision has distorted the intended impact and effect of that decision. Considering that the *Volvo Trucks* Court declined to exempt all secondary line bidding on *custom-made* goods from the Robinson-Patman Act, there is no support whatsoever for the Third Circuit's extension of that decision to *all* goods, even stock ones, simply because the sales resulted from a "bid"-type process.

The net effect of the Third Circuit's erroneous reading of the *Volvo Trucks* decision is to vitiate the Robinson-Patman Act's application to sales to distributors, where "bid"-type processes by end purchasers are used to select their suppliers. The Third Circuit's decision conflicts with the language of the Act and its underlying legislative history. It also drives *Volvo Trucks* into territory that this Court likely never intended. IFDA submits that it is not the province of an appellate court to narrow legislation in this way.

For these reasons, this Court should review the Third Circuit's *Feesers II* decision. An affirmation of the continuing validity of the Robinson-Patman Act's prohibition against unwarranted price discrimination is vital to the ability of IFDA's membership – foodservice distributors – to survive against the behemoths of the distribution marketplace, like GPOs and giant food management companies, that use their size as clout to secure unwarranted price concessions. Equally importantly, the inequitable marketplace that the Third Circuit's decision creates is not limited to the foodservice distribution industry. Although IFDA speaks for the substantial impact that the Third Circuit's decision has on the $110 billion of annual sales that its membership generates, the concerns raised here apply equally to the wide range of other industries in which distributors compete for end purchasers through the use of "bid"-type processes.

In summary, IFDA comes to this Court representing fair competition, not any particular competitor. It simply seeks to preserve the "level playing field" that the Robinson-Patman Act's prohibition against unjustified, discriminatory

discounting creates. In order to maintain and foster competition in the foodservice distribution industry, and other industries where distributors and suppliers are often selected through a "bid"-type process, IFDA respectfully requests that the Court grant Feesers's petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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